88-218

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE PIERSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether police conduct is flagrant, where a sixteen year old is arrested, at his house for interrogation, without probable cause or warrant based upon an anonymous tip, by police officers who used deception to take him from the presence of his grandparents and remove him from his house, or not flagrant as found by the State Appellate Court because "although the trial court found the police used deception in gaining access to the defendant, the deception apparently ended at the defendant's house" (App. 23), i.e., defendant was not beaten, but just held against his will?

2. Whether the illegality of the arrest is attenuated per se because another juvenile, who was also illegally and contemporaneously arrested with defendant, based on the same anonymous tip while not incriminating himself, incriminated defendant, where defendant's statement was given two hours after his arrest to the officers who arrested him?

3. Whether due process was denied by prosecutor's final argument that told the jury that the presumption of innocence is only "designed to protect people who are falsely accused of crimes. That's the whole intent of those laws"; and prosecutor's final argument that inflamed the jury by arguing how deceased will never see his "son play high school football ... never see his daughter

graduate" and by his accusing defense counsel of "lying", and keeping from the jury "the whole truth"?

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Wayne Pierson, was the defendant in the Circuit Court of Cook County, Illinois, appellant in the Appellate Court of Illinois, and petitioner in Petition for Leave to Appeal filed in the Supreme Court of Illinois. Respondent, People of the State of Illinois, was plaintiff in the Circuit Court of Cook County, Illinois, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

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1. The holding of the Appellate Court that the police conduct was not flagrant--where a sixteen year old is arrested at his house for interrogation without probable cause or warrant by police officers who used deception to take him from the presence of his grandparents and remove him from his house, because "although the trial court found the police used deception in gaining access to the defendant, the deception apparently ended at the defendant's house" (App. 23)--is in direct contradiction to this

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Court's opinion in Taylor v. Alabama, 457 U.S. 687, 73 L.Ed.2d 314 (1982).

The holding of the Appellate Court that the illegality of the arrest is attenuated per se because another juvenile who was illegally arrested, while not incriminating himself, incriminated defendant, where defendant's statement was given two hours after his arrest to the officers who arrested him, is contrary to the opinion of the United States Court of Appeals in United States v. Cherry, 759 F.2d 1196 (5 Cir. 1985), and decisions of other State reviewing courts, and is in total contradiction of the purpose of the Fourth Amendment. 16

2. Due process was denied by prosecutor's final argument that told the jury that the presumption of innocence is only "designed to protect people who are falsely accused of crimes. That's the whole intent of those laws"; and prosecutor's final argument that inflamed the jury by arguing how deceased will never see his "son play high school football ... never see his daughter graduate" and by his accusing defense counsel of "lying", and keeping from the jury "the whole truth." 29

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No.

WAYNE PIERSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner, Wayne Pierson (hereafter, defendant), prays that a writ of certiorari issue to review the denial by the Supreme Court of Illinois of Petition for Leave to Appeal from the decision of the Illinois Appellate Court, First

Judicial District, affirming his conviction and sentence for murder, in violation of Ill. Rev. Stat. 1985, Ch. 38, Sec. 9-1-A, Paragraphs 1 and 3.

Judgment, Opinion and Order Below

The Order of the Illinois Supreme Court denying Petition for Leave to Appeal is set out as Appendix A. The Opinion of the Appellate Court of Illinois, First Judicial District, affirming the trial court judgment is set out as Appendix B. The Order of the Appellate Court of Illinois, First Judicial District, denying Petition for Rehearing is set out as Appendix C.

Jurisdictional Statement

On February 18, 1988, the Illinois Appellate Court, First Judicial District, filed its Opinion affirming the judgment of the Circuit Court of Cook County, Illinois. A Petition for Rehearing timely filed was denied on March 17, 1988. Defendant's Petition for Leave to Appeal timely filed was denied by the Illinois Supreme Court on June 3, 1988. Jurisdiction is invoked under 28 U.S.C. 1257(3) and Rules 20.1 and 29 of this Court.

Constitutional Provisions

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses ... against unreasonable searches and seizures, shall not be violated....

AMENDMENT [V.]

No person shall ... be deprived of ... liberty ... without due process of law....

AMENDMENT [XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of ... liberty, without due process of law....

STATEMENT OF THE CASE

Nature of the Case

Defendant, Wayne Pierson, was found guilty of murder and sentenced to the Illinois Department of Corrections for a period of 28 years. The trial court denied his motion to suppress his statement, which was based on the assertion that the statement was obtained by unlawful arrest and interrogation in violation of defendant's due process rights. Although the trial court found defendant's arrest was illegal and resulted from police deception, he found that the taint of the arrest was *per se* removed by the police obtaining independent probable cause, *i.e.*, a statement from a person arrested with defendant. In contending that defendant's due process rights were

violated by his unlawful arrest and subsequent interrogation, defendant asserted that the per se rule is in violation of this Court's opinion in Taylor v. Alabama, 457 U.S. 687, 73 L.Ed.2d 314 (1982), and Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975). Defendant also contended that he was denied due process when the prosecutor (a) told the jury that the presumption of innocence is only applicable to persons wrongly accused, and (b) asserted they should consider that the deceased would never see his son play football or daughter graduate, and accused defense counsel of lying to the jury. The Illinois Appellate Court left standing the trial court's finding that defendant was unlawfully arrested, but held that the taint was sufficiently

attenuated to permit the admission of defendant's statement. The Illinois Appellate Court found that the prosecutorial remarks did not deny defendant a fair trial.

STATEMENT OF FACTS

Evidence Concerning Admissibility of Defendant's Statement

The trial court found that defendant was arrested without probable cause or a warrant, and taken from his house by deception, and the arresting officer's testimony not to be credible. He stated:

> "The Court finds that the defendant did not voluntarily go to the police station; the defendant was illegally detained by police; he was not free to leave, as was suggested by the State.
>
> The Court rules that the police had no probable cause for the initial arrest of the defendant at his home, and I will state that I do not believe the police officers' testimony in this regard; that he was free to leave.
>
> Relative to the initial arrest, I do believe the testimony which was offered by the Defense witnesses concerning police conduct at the defendant's home, and I disbelieve the officers' testimony." (Tr. 206) (Emphasis added.)

However, the trial court denied defendant's motion to suppress, holding that since Alfie Jones, a person who was illegally arrested by the same officers that arrested defendant and in the same arrest sweep, gave a statement that incriminated defendant, there was probable cause that attenuated any taint.[1] He stated:

> Defendant "[w]as in custody, but apparently provided them with no evidence that suggested anything which later resulted in the probable cause which resulted in a subsequent, lawful arrest and detention.
>
> Further, the Court finds that the statement by Althea Jones constitutes an intervening factor which gave rise to the lawful arrest." (Tr. 207)

The court's conclusion that defendant

---

1. Alfie Jones' statement did not incriminate himself.

was illegally arrested and that the police lied in court was based upon the following testimony.

Defendant's grandmother, her husband and defendant all testified that two officers came up to the second floor apartment, asked to speak to defendant in the next room about gang problems, took him to another room and then, when out of the presence of the grandparents, forced defendant to leave; he was transported to the police station. In route to the station, there was a stop where Alfie Jones was seized. Defendant was then placed in a locked interrogation room, and he was never told he was free to leave.

Defendant was sixteen years old at the time of his arrest; he had never before been arrested. (Tr. 194) Someone gave

him Miranda warnings. (Tr. 174) He did not understand all they said concerning his rights. (Tr. 188) He was told by one of his questioners that if he made a statement, the judge would probably go easier on him and give him probation, as he was a juvenile without past record. (Tr. 175) A police officer threatened to hit him when he told the officer he didn't do it.

The police testified defendant was arrested based on an anonymous phone call to the nephew of the victim wherein the caller stated that defendant and two others might be involved. The officers also said that they went to defendant's house; spoke to a woman who gave permission for defendant to go to the police station; that defendant went voluntarily and was free to leave at all

times, even after he was accused by Alfie Jones. Officers testified defendant was never told he was free to leave. The police had no independent basis for believing Jones' accusation of defendant. (Tr. 34-37) The police knew nothing about Jones' past or his reputation in the community. (Tr. 34) Alfie Jones' statement did not incriminate himself. (Tr. 38-42)

Evidence At Trial

At trial, the State presented testimony that the weapon used had been lent to defendant. (Tr. 275) The State introduced defendant's statement in which he stated that while he said "stick up", he was proceeding with a prank and only desired to scare deceased (Tr. 384) and he was sorry. (Tr. 386) Robert Phillips, who worked with deceased in his

grocery store, testified that as he and deceased were closing the store, a masked person walked up and said "hold up" (Tr. 281), and deceased turned, and the person shot. (Tr. 282) The person with the gun never said, "I want money" (Tr. 288), never said "raise hands" (Tr. 288), never said "take things out of your pocket." (Tr 289)

Evidence Regarding Prejudicial Evidence And Argument

The prosecutor in his last opportunity to talk to the jury argued:

> "Each and every one of us is lucky to be able to live in this country because we have those laws and they are designed to protect people who are falsely accused of crimes. That's the whole intent of those laws." (Tr. 466-467)

Over objection, the State presented, through the deceased's tearful wife, how she and deceased were born in Jordan;

were married in Jordan; how the deceased came to America in 1974 by himself, worked for two years and then sent for his wife (Tr. 245) their two children, Roger, 14, and Ruby, 11; how he opened up his own store (Tr. 245) at 51st West Racine; then in 1983, was able to buy another store at 57th and Morgan (Tr. 246); how he worked long hours in the store. (Tr. 247) The prosecutor in final argument stated:

> "And let's not forget, ladies and gentlemen, the victim himself, Mr. Michael Samawi. Mr. Michael Samawi was fifty eight years old at the time of his death, at the time of his killing.
>
> He was a business man. He was hard working, supporting his family. He was shot down on the streets of Chicago in a senseless murder.
>
> MR. MICHAEL SAMAWI WILL NEVER SEE HIS SON PLAY HIGH SCHOOL

FOOTBALL OR GRADUATE. HE WILL NEVER SEE HIS DAUGHTER GRADUATE." (Tr. 442)

He ended his argument as follows:

"I am Michael Samawi for purposes of this argument. That's my widow out there who grieves every day." (Tr. 484)

Upon conviction, defendant was sentenced to 28 years.

REASONS FOR GRANTING CERTIORARI

1.

The holding of the Appellate Court that the police conduct was not flagrant--where a sixteen year old is arrested at his house for interrogation without probable cause or warrant by police officers who used deception to take him from the presence of his grandparents and remove him from his house, because "although the trial court found the police used deception in gaining access to the defendant, the deception apparently ended at the defendant's house" (App. 23)--is in direct contradiction to this Court's opinion in Taylor v. Alabama, 457 U.S. 687, 73 L.Ed.2d 314 (1982).

The holding of the Appellate Court that the illegality of the arrest is attenuated per se because another juvenile who was illegally arrested, while not incriminating himself, incriminated defendant, where defendant's statement was given two hours after his arrest to the officers who arrested him, is contrary to the opinion of the United States Court of Appeals in United States v. Cherry, 759 F.2d 1196 (5 Cir. 1985), and decisions of other State reviewing courts, and is in total contradiction of the purpose of the Fourth Amendment.

Defendant, sixteen, was arrested in his home without probable cause or

warrant for the purpose of interrogation. The arrest was based upon an anonymous tip that defendant and two others may have been involved in a homicide. Officers lied to defendant's grandparents in order to take him into a different room of the house, and then once out of the grandparents' presence, forced him to leave his house. They kept defendant in a locked police car on route to the police station. During the ride to the police station, the police stopped and seized without probable cause or warrant another juvenile. At the police station, defendant was locked in an interrogation room for two hours. During this time, the other juvenile, without incriminating himself, incriminated defendant. Defendant was then questioned and made an incriminating statement.

The State trial judge accepted as true the above facts as testified to by defendant and his family; he also found that the police lied when they testified as to the circumstance of the arrest. He stated:

> "The Court finds that the defendant did not voluntarily go to the police station; the defendant was illegally detained by police; he was not free to leave, as was suggested by the State.
>
> The Court rules that the police had no probable cause for the initial arrest of the defendant at his home, and I will state that I do not believe the police officers' testimony in this regard; that he was free to leave.
>
> Relative to the initial arrest, I do believe the testimony which was offered by the Defense witnesses concerning police conduct at the defendant's home, and I disbelieve the officers' testimony." (Tr. 206) (Emphasis added.)

However, he held that the statement by the other juvenile was an intervening circumstance that per se removed the taint. The Appellate Court agreed,[2] because in its opinion, the police action was not flagrant, stating:

> "[a]lthough the police initially arrested the defendant without probable cause, the police conduct in effectuating the arrest was not particularly flagrant. This was not, as the defendant suggests, an "arrest sweep" conducted by the police in the hope that something might turn up. Rather, the officers were acting on an anonymous tip that three named individuals had knowledge of the shooting. ALTHOUGH THE TRIAL COURT FOUND

2. The Appellate Court's reliance on the trial court's determination of attenuation (Op. p. 9) is improper. The trial court applied a per se rule, i.e., relied solely upon the assertion that independent probable cause existed, and never made an evaluation as required. Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975), and Taylor v. Alabama, 457 U.S. 687, 73 L.Ed.2d 314 (1982).

> THAT THE POLICE USED DECEPTION IN GAINING INITIAL ACCESS TO THE DEFENDANT, THE DECEPTION APPARENTLY ENDED AT THE DEFENDANT'S HOUSE. While we do not in any way condone such police tactics, we do not believe that the misconduct was determinative under the attenuation analysis." (Op. pp. 9-10)

This holding is contrary to Taylor v. Albama, 457 U.S. 687, 73 L.Ed.2d 314 (1982).

In Taylor v. Alabama, the facts are quite similar to those here:

> "An individual who was at that time incarcerated on unrelated charges told a police officer that 'he had heard that [petitioner] Omar Taylor was involved in the robbery.' ... This individual had never before given similar information to this officer, did not tell the officer where he had heard this information, and did not provide any details of the crime. This tip was insufficient to give police probable cause to obtain a warrant or to arrest petitioner.

> Nonetheless, on the basis of this information, two officers arrested petitioner without a warrant. They told petitioner that he was being arrested in connection with the grocery-store robbery, searched him, and took him to the station for questioning. Petitioner was given the warnings required by Miranda v Arizona." Taylor v. Alabama, 457 U.S. 687, at 689-690.

This Court in Taylor held these facts demonstrate a purposeful flagrant violation of the Fourth Amendment.

> "Finally, the State argues that the police conduct here was not flagrant or purposeful, and that we should not follow our decisions in Brown and Dunaway for that reason. However, we fail to see any relevant distinction between the conduct here and that in Dunaway. In this case, as in Dunaway, the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up. The fact that the police did not physically abuse petitioner, or

> that the confession they obtained may have been 'voluntary' for purposes of the Fifth Amendment, does not cure the illegality of the initial arrest." Taylor v. Alabama, 457 U.S. 687, at 693.

The Illinois Appellate Court's finding of no flagrant conduct is in direct opposition to this Court's prior ruling in Taylor.[3]

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3. A further reason for finding the police action flagrant is that the officers' devious conduct--secretly taking defendant away from his grandmother--is in direct opposition to legislative directive. Defendant was sixteen years old, a minor. Ill. Rev. Stat., Chap. 37, Sec. 703-2 orders that:

> "A law enforcement officer who takes a minor into custody without a warrant under Section 3-1 shall, if the minor is not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care or the person with whom the minor resides that the minor has been taken into custody and where the minor is being held."

Here, the State should not be excused from the force of the exclusionary rules, because the seizure of defendant was a purposeful violation. In McCall v. People, 623 P.2d 397 (Colo. 1981), the Colorado Supreme Court wisely stated:

> "Finally, the evidence depicts a deliberate choice on the part of law enforcement officials to exercise deception in gaining entry into the defendant's home and to employ trickery in their efforts to extract an incriminating statement from him. This type of official misconduct belies any legitimate claim to exemption from the sanctions of the exclusionary rule. The governmental impropriety intruded so severely on the interests protected by the Fourth Amendment as necessarily to trigger the full safeguards of the poisonous tree doctrine. See Dunaway v. New York, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)...." 623 P.2d at 404.

Where the police activity is flagrant, the evidence of attenuation must be great. Justice Powell in his concurring

opinion in Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975), stated:

> "I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights. If, for example, the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable ... the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity...." 422 U.S. 610, 611.

To give proper deterrent effect to the Fourth Amendment, statements obtained in close proximity to such an unlawful seizure must be suppressed, because there is no basis for finding attenuation by the mere fact that during the illegal detention, a measure of probable cause is obtained.

The per se rule has been rejected in United States v. Cherry, 759 F.2d 1196 (5 Cir. 1985). There, citing Supreme Court authority, the court explained its reasoning for rejecting the per se rule as follows:

> "[t]he government apparently argues that the intervening advent of probable cause for Cherry's detention was per se sufficient to render the consent free from taint. This argument is without merit. The intervening discovery of probable cause to support a suspect's detention, by itself, 'cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.' Brown v. Illinois, 422 U.S. at 603, 95 S.Ct. at 2261."

In accord, State v. Winegar, 147 Ariz. 440, 711 P.2d 579 (Ariz. 1985); Gregg v. State, 667 S.W.2d 125 (Tex.Ct.App. 1984).

There should be no attenuation where the police illegally seize two youths and obtain a statement from one and that

statement is the alleged independent probable cause. Such rule, as here stated by the Illinois courts, provides an incentive for the police to seize persons in flagrant violation of the Fourth Amendment. There is no independent probable cause, no evidence not tainted by police illegal activity. see Murray v. United States, ___ U.S. ___, 43 CrL 3168 (1988).

There was no attenuation because of passage of time. Cf. Taylor v. Alabama, supra (6 hours); Brown v. Illinois, supra (4 hours). Here, the State concedes:

> "That the time that passed between the time defendant left his home and the time he confessed, approximately 2 hours, may have been insufficient to attenuate the taint." (St. Br., 29)

A further reason for finding no attenuation in this case is the youth of

the defendant, who was sixteen years old at the time that he was seized. This Court has consistently recognized that the coerciveness of the custodial setting is of heightened concern where a juvenile is under investigation. Fare v. Michael C., 442 U.S. 707, 61 L.Ed.2d 197 (1979).[4]

There was no attenuation and there could not have been, because the minor defendant was denied the opportunity to have his grandparents (his guardians)

4. A final reason for finding no attenuation is that no credible testimony rebutted defendant's testimony that the protective effect of Miranda warnings was minimized or eliminated by police trickery, i.e., by telling defendant that "the judge would probably go easier on me and give me some kind of probation being a juvenile and you have not past record." (Tr. 54) Defendant's testimony is credible and he was not impeached on cross-examination. The officers' denials should fall on deaf ears because their testimony was less than truthful concerning how defendant was taken from his house.

present or in knowledge of his whereabouts or questioning, as the result of the illegal seizure.

Additionally, there should be no attenuation, where the police, in a continuation of their attempt to violate defendant's rights, lie in court as to the circumstances of the arrest, as found here.

Here, this Court should grant the petition to correct the erroneous decision of the Illinois Appellate Court that stands as a misleading precedent on this vital issue, in contravention of the decision of this Court.

2.

Due process was denied by prosecutor's final argument that told the jury that the presumption of innocence is only "designed to protect people who are falsely accused of crimes. That's the whole intent of those laws"; and prosecutor's final argument that inflamed the jury by arguing how deceased will never see his "son play high school football ... never see his daughter graduate" and by his accusing defense counsel of "lying", and keeping from the jury "the whole truth."

A prosecutor can strike hard, but not unfair blows. Berger v. United States, 295 U.S. 78, 79 L.Ed. 1314 (1935). Arguments, as here, were unfair blows, denying due process, because defendant's statement was in part exculpatory. The

State's case was not overwhelming.[5] Hence, the prosecutor found the need to strike foul blows.

The prosecutor in his last opportunity to talk to the jury argued as follows:

> "Each and every one of us is lucky to be able to live in this country because we have those laws and they are designed to protect people who are falsely accused of crimes. That's the whole intent of those laws." (Tr. 466-467)

The presumption of innocence is so fundamental to due process that providing the jury merely with an instruction on reasonable doubt without an instruction on presumption of innocence is plain

5. Defendant's assertion was that he was merely attempting to scare the victim, part of a sixteen year old's misguided prank, and that the gun fired accidentally, causing the offense merely to be involuntary manslaughter. His right to a fair evaluation was destroyed by the prosecutor's improper argument.

error. Taylor v. Kentucky, 436 U.S. 478, 56 L.Ed.2d 468 (1978). The prosecutor's argument so diminished the effect of the presumption of innocence.

Defendant's due process rights were also denied by inflammatory argument designed to prejudice defendant.[6] The prosecutor argued:

> "And let's not forget, ladies and gentlemen, the victim himself, Mr. Michael Samawi. Mr. Michael Samawi was fifty eight years old at the time of his death, at the time of his killing.

6. Over objection, the State presented irrelevant evidence through the deceased's tearful wife, how she and deceased were born in Jordan; were married in Jordan; how the deceased came to America in 1974 by himself, worked for two years and then sent for his wife (Tr. 245) their two children, Roger, 14, and Ruby, 11; how he opened up his own store (Tr. 245) at 51st West Racine; then in 1983, was able to buy another store at 57th and Morgan (Tr. 246); how he worked long hours in the store. (Tr. 247)

> He was a business man. He was hard working, supporting his family. He was shot down on the streets of Chicago in a senseless murder.
>
> MR. MICHAEL SAMAWI WILL NEVER SEE HIS SON PLAY HIGH SCHOOL FOOTBALL OR GRADUATE. HE WILL NEVER SEE HIS DAUGHTER GRADUATE." (Tr. 442)

He ended his argument as follows:

> "I am Michael Samawi for purposes of this argument. That's my widow out there who grieves every day." (Tr. 484)

The Appellate Court's determination that these errors did not deprive defendant of a fair trial is erroneous considering the compounded improprieties.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

66757

ILLINOIS SUPREME COURT
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June 3, 1988

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No. 66757 - People State of Illinois, respondent, v. Wayne Pierson, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1988.

FOURTH DIVISION
February 18, 1988

NOTICE
The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

86-2880

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
vs.	)	Honorable Michael Getty,
WAYNE PIERSON, Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE JIGANTI delivered the opinion of the court:

Following a jury trial the defendant, Wayne Pierson, was convicted of murder (Ill. Rev. Stat. 1985, ch. 38, par. 9-1) and sentenced to a term of 28 years. He contends on appeal that the trial court erred in denying a motion to suppress his statement and that he was denied a fair trial as the result of certain

inflammatory and improper remarks by the prosecutor during closing arguments. The defendant further contends that, if his statement is suppressed, the remaining evidence is insufficient to sustain his conviction for murder.

This cause involves the fatal shooting of Michael Samawi, a store owner, on January 5, 1985. Several days later, the 16-year-old defendant made a statement to the police implicating himself as the offender. At a hearing on the defendant's motion to suppress this statement, the State presented testimony that the police officers investigating the crime were told by the victim's nephew that he had received an anonymous phone call stating that three individuals, the defendant, Alfie Jones

and Antoine Hudson, had knowledge of the shooting. Based on this tip the officers went to the defendant's home and obtained permission from the defendant's grandmother to speak with him about the shooting. After a brief conversation, the defendant voluntarily accompanied the officers as they picked up Alfie Jones and drove to the police station. At the station the defendant remained alone in an interview room while the police questioned Alfie Jones. According to the officers' testimony the defendant was not under arrest and was at all times free to leave.

Alfie Jones told the officers that he witnessed the shooting and gave a detailed statement concerning the incident. Jones stated that on January

4, 1985, he, the defendant and Antoine Hudson were at Hudson's house when the defendant produced a .32-caliber revolver which he claimed he had received from William Connor. On the followng day they met again at Hudson's house and discussed "possible places that could be stuck up." At this time, the defendant produced the gun and said that it was fully loaded. He said that he was going to rob someone, but Jones and Hudson wanted no part of this plan. At approximately 6 p.m., the defendant left Hudson's house and walked toward 5700 South Morgan. Jones and Hudson, knowing what the defendant had planned, positioned themselves on the north side of 57th Street where they had an unobstructed view of the store located at

5700 South Morgan. They watched as defendant approached an Arab and a black man who were locking the security gates on the outside of the store. The defendant held the gun in his right hand, approached the Arab and said something. The Arab turned and took a step toward the defendant at which time the defendant fired two shots at him. The Arab moved closer, and the defendant fired two more shots at him. He grabbed his chest and the black man who was with him ran to call the police. The defendant ran east on 57th Street. As he passed Jones and Hudson, he removed a brown ski mask with yellow trim that he had been wearing. Jones had given him the ski mask earlier that day. Meanwhile, the Arab had managed to seat himself in a car awaiting

arrival of the police. On the following day, the defendant showed Jones and Hudson four expended cartridge casings from the gun he had used in the shooting.

After hearing Jones' statement, the officers told the defendant that he was under arrest and gave him the Miranda warnings. This occurred approximately two hours after he was brought to the station. After being confronted with Jones' statement, the defendant made the statement which formed the substance of his motion to suppress. According to the officers, no promises were made to the defendant and he was not threatened in any way. They did tell him that he could be prosecuted as an adult.

The testimony presented by the defense at the suppression hearing differed

markedly from the State's version regarding what transpired at the defendant's house during his initial contact with the police. According to the defendant's grandmother and other family members, the officers stated that they wanted to talk to the defendant about "gang problems" and would not remove him from the premises. The grandmother told the officers that they could talk to the defendant in the living room. The defendant testified that when they entered the living room, the officers threw him his coat and told him to come down to their car to talk. He had never been arrested before and believed that he was required to go with them. They then locked him in the car and drove to Alfie Jones' house. One

officer remained in the car with him as the others went in for Jones, and he did not feel that he was free to leave. The defendant stated that when they reached the police station, he was locked in a room on the third floor and given the Miranda warnings. He did not understand all that was said concerning his rights. One of the officers told him that if he made a statement, the judge would probably give him probation because he was a juvenile with no prior record.

At the conclusion of the hearing, the trial court found that the defendant was unlawfully arrested at his home and did not voluntarily accompany the officers to the police station. The court made a specific finding that it believed the testimony of the defense witnesses as to

what transpired at the defendant's home and that it rejected the testimony of the police officers on that point. However, the court found that the statement of Alfie Jones supplied the officers with probable cause to arrest the defendant and served as an intervening factor which sufficiently attenuated the taint of the initial illegal arrest. The court therefore denied the defendant's motion to suppress the statement which he made after having been confronted with Alfie Jones' statement.

At trial, Robert Phillips testified that he worked at Michael Samawi's store at 5700 South Morgan in Chicago. At 6 p.m. on January 5, 1985, he and Samawi were locking the security gates when they were approached by a black man wearing a

ski mask. The man pointed a gun at them and announced a "hold up." As they turned toward the man, he fired two shots at Samawi and one shot at Phillips, then fled. Phillips helped Samawi, who had been wounded, into a car then called the police. It was stipulated that Samawi died of multiple gunshot wounds in his chest. Phillips testified that he gave a statement to the police shortly after the shooting occurred. The State also introduced into evidence the contents of the defendant's statement, in which the defendant said that he was only trying to scare Samawi and began to shoot because Samawi tried to grab the gun and also appeared to be reaching for a gun of his own.

The facts relating to the allegedly improper remarks made by the prosecutor will be detailed later in connection with our discussion of that issue.

The defendant first contends that the trial court erred in denying his motion to suppress. He maintains that the statement of Alfie Jones was insufficient to provide probable cause for his arrest because Jones' reliability as an informant had not been established. He further maintains that even if Jones' statement did provide probable cause, it did not constitute a sufficient intervening factor to attenuate the taint of the initial unlawful arrest. The State maintains that the defendant voluntarily accompanied the police and was not arrested until after Alfie Jones'

statement provided the necessary probable cause. We will not consider this argument because we agree with the State's alternate contention that the taint from the initial arrest was sufficiently attenuated.

Probable cause to arrest exists when the facts and circumstances known to the police would justify the belief in a person of reasonable caution that the person to be arrested has committed a crime. (People v. Lekas (1987), 155 Ill. App. 3d 391, 410, 508 N.E.2d 221.) The probability of criminal activity, and not proof beyond a reasonable doubt, is the standard for assessing probable cause. (People v. Cruz (1983), 119 Ill. App. 3d 868, 880, 457 N.E.2d 1281.) Nevertheless, the information relied upon

to establish probable cause must be supported by some indicia of reliability. (People v. James (1987), 118 Ill. 2d 214, 222, 514 N.E.2d 998.) In Aguilar v. Texas (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, the United States Supreme Court established a two-prong test to be used in determining whether information supplied by an informant is sufficient to establish probable cause. First, the informant must state his basis of knowledge; second, there must be some circumstances supporting the conclusion that the informant is reliable. In Spinelli v. United States (1969), 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, the Court indicated that the reliability prong could be supported "by detailing reasons

in support of the conclusions that the informant is reliable and by independent corroboration of the information given by the informant." People v. James (1987), 118 Ill. 2d 214, 223, 514 N.E.2d 998, 1002.

The Court subsequently abandoned the two-prong Aguilar-Spinelli test in Illinois v. Gates (1983), 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317, and adopted in its place a "totality of the circumstances" approach to determining probable cause. Under this approach, the existence of probable cause is not governed by technical legal rules but by common-sense considerations which are factual and practical. (People v. Tisler (1984), 103 Ill. 2d 226, 236, 469 N.E.2d 147.) The reliability and basis of

knowledge of an informant are not treated as independent requirements but as closely intertwined factors in resolving the practical question of whether probable cause exists. (People v. Mitchell (1984), 123 Ill. App. 3d 868, 873, 463 N.E.2d 864.) Along these lines, it has been suggested that "where there is some doubt as to the informant's motives, his explicit and detailed description of the crime, along with a statement that he was an eyewitness thereto, entitles his tip to greater weight than it might otherwise receive." People v. Mitchell (1984), 123 Ill. App. 3d 868, 873, 463 N.E.2d 864, 869, see also People v. Cruz (1983), 119 Ill. App. 3d 868, 457 N.E.2d 1281.

In the case at bar, the police were told by the victim's nephew that he had received an anonymous telephone tip that the defendant, Alfie Jones and Antoine Hudson had knowledge of the shooting. When they questioned Alfie Jones, he confirmed that he did have such knowledge and that he was in fact an eyewitness to the crime. He then gave a very detailed statement to the police which included identification of the victim, the time and location of the incident, the type of weapon used and a description of the ski mask worn by the defendant. Robert Phillips, who gave a statement to the police shortly after the shooting, testified at trial that the offender was wearing a ski mask. One of the officers who testified at the suppression hearing

stated that Jones' statement was then compared with the information contained in the police reports. When the information given by Jones matched what the officers already knew, they placed the defendant under arrest. In our view, the detailed eyewitness description of the incident provided by Alfie Jones, which corroborated the information already known to the police, provided sufficient probable cause to arrest the defendant at that time.

The defendant next maintains that, even if Jones' statement did provide probable cause for his arrest, it was not sufficient, standing alone, to dissipate the taint of the initial illegal arrest.

Where the State seeks to introduce a statement made by the defendant after an

illegal arrest, it must establish that the statement was an exercise of the defendant's free will, independent of any taint of the illegal arrest. (See Wong Sun v. United States (1963), 371 U.S. 471, 486, 9 L. Ed. 2d 441, 83 S. Ct. 407.) Four factors have been identified as relevant in determining whether the taint from the primary illegality has been attenuated: (1) the temporal proximity of the illegality to the evidence obtained; (2) the presence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct; and (4) the presence or absence of Miranda warnings. (People v. Dortch (1982), 109 Ill. App. 3d 761, 765, 441 N.E.2d 100, 104.) These factors were derived from the United States Supreme

Court decision in Brown v. Illinois (1975), 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254.

The State concedes that the two-hour lapse between the defendant's illegal arrest and his statement to police was insufficient to purge the taint of the illegal arrest. The State argues, however, that the defendant was given the Miranda warnings and that the initial arrest was not accomplished by flagrnt misconduct. Also, and most important, the State maintains that the probable cause to arrest provided by Alfie Jones' statement constituted an intervening circumstance which served to attenuate the taint of the illegal arrest.

The defendant, citing United States v. Cherry (5th Cir. 1985), 759 F.2d 1196,

cert. denied, 93 L. Ed. 2d 983, contends that intervening probable cause, by itself, is insufficient to purge the taint of an illegal arrest. While the Court in Cherry did hold that intervening probable cause "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited," it went on to state that "the intervening acquisition of probable cause is an important attenuating factor in the analysis." (759 F.2d 1196, 1212.) As stated by this court in People v. Lekas (1987), 155 Ill. App. 3d 391, 414, 508 N.E.2d 221, 237, where the police acquire probable cause after an arrest but before a statement is given, "one could question the wisdom of requiring police to go through the formality of releasing [the

defendant], only to rearrest him outside the jailhouse door."

It is well established that the decision of the trial court on a motion to suppress will not be reversed unless it is manifestly erroneous. (People v. Lekas (1987), 155 Ill. App. 3d 391, 415, 508 N.E.2d 221.) Our analysis of the situation in the case at bar leads us to conclude that the trial court's finding that the defendant's statement was sufficiently attenuated from his arrest was not manifestly erroneous. As we have stated, the intervening acquisition of probable cause is an important factor in the attenuating analysis. Also, in our view, although the police initially arrested the defendant without probable cause, the police conduct in effectuating

the arrest was not particularly flagrant. This was not, as the defendant suggests, an "arrest sweep" conducted by the police in the hope that something might turn up. Rather, the officers were acting on an anonymous tip that three named individuals had knowledge of the shooting. Although the trial court found that the police used deception in gaining initial access to the defendant, the deception apparently ended at the defendant's house. While we do not in any way condone such police tactics, we do not believe that the misconduct was determinative under the attenuation analysis.

As stated earlier, one of the points raised by the defendant in this appeal is that, absent evidence of the defendant's

statement, the remaining evidence is insufficient to support his conviction for murder. Because we have determined that the statement was admissible, it is unnecessary for us to consider this issue.

The defendant next contends that certain inflammatory and improper remarks by the prosecutor during closing argument served to deny him a fair trial.

The first remark was a reference to the victim's family. After commenting that the victim was a hardworking businessman, the prosecutor stated that "Michael Samawi will never see his son play high school football or graduate. He will never see his daughter graduate." Generally, remarks about the victim's family which are designed to

arouse the sympathy and passions of the jury are improper. (People v. Beringer (1987), 151 Ill. App. 3d 558, 563, 503 N.E.2d 778.) However, the supreme court has recognized that "[c]ommon sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members." (People v. Free (1983), 94 Ill. 2d 378, 415, 447 N.E.2d 218, cert. denied, 464 U.S. 865.) Considering the prosecutor's remark in the context of the entire case, we believe that it was at most harmless error. Along the same line, the prosecutor later stated that "I am Michael Samawi for purposes of this argument. That's my widow out there who grieves every day." This comment was clearly invited by defense counsel's

earlier statement that "for the purpose of this trial I am Wayne Pierson and I speak for Wayne Pierson. And Wayne Pierson is saying to you through me or by me that he is not guilty of murder." Where comments are invited by the defendant's argument, they cannot be urged as error on appeal. (People v. Collins (1985), 106 Ill. 2d 237, 277, 478 N.E.2d 267, cert. denied, 474 U.S. 935.) In any event, we do not find the prosecutor's comment prejudicial.

The defendant next agues that the prosecutor made a number of comments which disparaged defense counsel and accused him of lying. At one point, the prosecutor stated that "Mrs. Samawi according to counsel is unimportant in this case. *** That's the first half

truth, the first lie that you are being given." The court sustained an objection to this comment and informed the jury that "[n]either side when they argue their point of view is deemed to be lying." We believe that the trial court's actions served to cure any prejudice which might otherwise have resulted. (People v. Carlson (1980), 79 Ill. 2d 564, 577, 404 N.E.2d 233.) The prosecutor subsequently stated that defense counsel "has been attempting to keep the whole truth from you" and "has in fact not presented an entire picture of what happened that night." Again, the trial court instructed the jury to disregard the remark and admonished counsel from both sides not to make personal accusations against one

another. Under these circumstances, we do not believe that these remarks warrant a new trial.

During rebuttal argument, the prosecutor made a remark which the defendant claims had the effect of disparaging the presumption of innocence. Specifically, the prosecutor stated that the laws of this country "are designed to protect people who are falsely accused of crime." After a defense objection, the prosecutor corrected himself and informed the jury that the laws are designed "to protect not only innocent people accused of crimes, any person accused of a crime." Because the misstatement was corrected, no error occurred. We conclude that the remarks made by the prosecutor,

considered either individually or cumulatively, did not serve to deny the defendant a fair trial.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.

JOHNSON and McMORROW, JJ., concur.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee,	)	
v.	)	No. 86-2880
WAYNE PIERSON, Defendant-Appellant.	)	

ORDER

This cause coming to be heard on the Petition for Rehearing of the Defendant-Appellant, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petition for Rehearing be denied.

DATED at Chicago, Illinois, this 17th day of March, 1988

_____
Justice

_____
Justice

_____
Justice

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-218 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WAYNE PIERSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Whether no legal issue is raised since the Illinois Appellate Court specifically applied the four factors set forth in Brown v. Illinois for determining whether the taint from an illegal arrest has been attenuated in properly ruling that the taint of the illegal arrest was attenuated, and petitioner's subsequent statement was admissible.

Whether no legal issue is raised where the Appellate Court considered each prosecutorial comment now raised by petitioner as denying him due process, applied established Illinois precedent and properly concluded that the prosecutor's remarks did not serve to deprive petitioner of a fair trial.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WAYNE PIERSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JURISDICTION

Petitioner seeks leave to invoke the jurisdiction of the Court pursuant to 28 U.S.C. sec. 1257(3). However petitioner, who raises only factual questions concerning the presence of factors attenuating the taint from an illegal arrest and the propriety of a few isolated prosecutorial remarks in closing argument, has failed to present grounds warranting a grant of certiorari.

STATEMENT OF THE CASE

Petitioner, Wayne Pierson, was charged with the murder and attempt armed robbery of Michael Samawi, the owner of a small grocery store located on the south side of Chicago, Illinois. Prior to trial, petitioner filed a motion to suppress his confession to the crimes, alleging that his statements were the product of an unlawful arrest, obtained in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

Evidence adduced at the hearing on the motion revealed that police officers, acting on a tip received in an anonymous telephone call to the victim's nephew naming the petitioner, Alfie Jones and Antoine Hudson as having knowledge of the crime, went to the homes of petitioner and Alfie Jones and asked them to come to the police station for questioning. (Tr. 5, 80-81) The officers

went to defendant's house at approximately 2:00 p.m. (Tr. 6) The testimony of the State's witnesses and the defendant's witnesses differed as to what happened next. The police officers testified that when a woman answered the door, they asked for petitioner and the woman called for him. (Tr. 62) They further testified that they told the woman and petitioner that they were investigating a murder of a store-owner and wanted to question petitioner, whereupon petitioner accompanied the officers to an unmarked police car. (Tr. 63-66) Petitioner testified that he encountered the police officers as he was leaving the building, and they told him they were looking for him. (Tr. 166) Petitioner then went to his upstairs apartment with the officers, who sat on his grandmother's bed and told her that they wanted to talk to petitioner in the front room and once in the front room, petitioner was asked to go to the police car, which he did. (Tr. 168)

Once petitioner was in the car, the officers drove to the police station stopping to pick up another of the persons named in the telephone tip, Alfie Jones, and attempting to locate the third, Antoine Hudson. (Tr. 67-68) The group arrived at the police station at approximately 3:00 p.m. (Tr. 47, 88) Petitioner accompanied the police officers to an interview room where he remained alone and unhandcuffed for an hour while the officers interviewed Alfie Jones. (Tr. 73-74) Alfie Jones gave a detailed account of the shooting, stating that he saw petitioner shoot Michael Samawi and had discussed committing a robbery with petitioner prior to the shooting. (Tr. 14-16) Jones described the type of weapon used by petitioner; the time and date of the murder; the persons present; the actions of the deceased, an employee of the store who was present, and the petitioner; the number of shots fired; and the clothing worn by

petitioner. The police officers then compared Jones' statement with their police reports and found that the details were corroborated. (Tr. 36, 100, 101)

After the interview with Jones, police officers told petitioner he was under arrest and advised him of the Miranda warnings, as well as the fact that he could be tried and sentenced as an adult. (Tr. 14-16) Petitioner acknowledged that he understood each right and was then informed that he had been implicated by Alfie Jones. (Tr. 15, 73) Petitioner then made statements confessing to the murder. (Tr. 73-74, 370-385)

In ruling on the motion, the trial court stated that it did not believe the officers' testimony regarding what occurred at defendant's home but, instead, believed the defense witnesses. (Tr. 207) The court then held that the police had no probable cause for the initial arrest of defendant at

his home. (Tr. 207) Nonetheless, the trial court found that Alfie Jones' statement acted as an intervening factor giving police probable cause for defendant's lawful arrest at the police station, and hence, that defendant's statements were admissible. (Tr. 207)

At trial, the State presented the testimony of Robert Phillips, an employee of the store who was present when the owner was shot; the statements of petitioner; and ballistics evidence establishing that the gun borrowed by petitioner fired the bullets which killed the victim. Both sides argued to the jury, which returned verdicts finding petitioner guilty of murder and attempt armed robbery. (Tr. 525) Petitioner was sentenced to 28 years for murder in the Illinois Department of Corrections. (R. 534)

Petitioner then appealed his convictions to the Illinois Appellate Court, First District, arguing that the trial court

improperly denied his motion to suppress and that he was denied a fair trial as the result of certain allegedly inflammatory and improper remarks by the prosecutor during closing argument. The State initially maintained that petitioner voluntarily accompanied the officers to the station and was arrested only after Alfie Jones' statement had given the officers probable cause. The Appellate Court declined to consider this contention since it agreed with the State's alternate contention that the taint from the initial arrest was sufficiently attenuated at the time petitioner made his statement, applying the four factors set forth for determining attenuation in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975): People v. Pierson, 166 Ill. App. 3d 558, 519 N.E.2d 1185 (1st Dist. 1988). The court further ruled that the prosecutor's remarks, considered either individually or

cumulatively, did not serve to deny the defendant a fair trial. (Pet. for Cert., App. 28-29) Petitioner's petition for rehearing in the Appellate Court was denied, as was his petition for leave to appeal to the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT

I.

NO LEGAL ISSUE IS RAISED SINCE THE ILLINOIS APPELLATE COURT SPECIFICALLY APPLIED THE FOUR FACTORS SET FORTH IN BROWN V. ILLINOIS FOR DETERMINING WHETHER THE TAINT FROM AN ILLEGAL ARREST HAS BEEN ATTENUATED IN RULING THAT THE TAINT OF THE ILLEGAL ARREST WAS ATTENUATED AND PETITIONER'S SUBSEQUENT STATEMENT WAS ADMISSIBLE.

Petitioner asks that a writ of certiorari issue to review the Illinois Appellate Court's determination, under Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975), that the police misconduct in the instant case was not particularly flagrant, and further argues that the same court improperly applied a "per se" test for attenuation, allegedly finding that the illegality of petitioner's arrest was attenuated "per se" because of an intervening statement made by an eyewitness implicating petitioner. Since petitioner

concedes by his argument that the appellate court considered at least one other factor in addition to an intervening circumstance, namely, the mildness of the police misconduct in the instant case, petitioner's assertion that the appellate court incorrectly used a "per se" analysis must be viewed as a transparent attempt to convert a purely factual issue into a legal one.

Counsel for the State of Illinois, therefore, urge this Court to deny the writ since petitioner raises no legal issue. The Appellate Court specifically considered all four factors set forth in Brown v. Illinois, supra, for determining whether a confession has been purged of the taint of the illegal arrest, and properly determined that while the two hour time lapse was insufficient to purge the taint of the illegal arrest, the facts that (1) petitioner was given Miranda warnings; (2) the initial arrest was not accompanied by flagrant police misconduct;

and (3) most importantly, the probable cause to arrest supplied by an eyewitness' detailed and corroborated account of the crime implicating petitioner constituted an intervening circumstance; all served to attenuate the taint from the illegal arrest and petitioner's subsequent statement was therefore admissible. People v. Pierson, 166 Ill. App. 3d 558, 519 N.E.2d 1185 (1st Dist. 1988). Thus, the appellate court employed the appropriate legal standard in the instant case.

In drafting its opinion, the Illinois Appellate Court, explicitly citing to Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), first correctly observed: "Where the State seeks to introduce a statement made by the defendant after an illegal arrest, it must establish that the statement was an exercise of the defendant's free will, independent of any taint of the illegal arrest." People v.

Pierson, 166 Ill. App. 3d 558, 563, 519 N.E.2d 1185 (1st Dist. 1988). The court then enumerated four factors for determining whether the taint from the primary illegality has been attenuated, explicitly relying on Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975): (1) the temporal proximity of the illegality to the evidence obtained; (2) the presence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct, and (4) the presence or absence of Miranda warnings. Id. The analysis set forth in Brown has been repeatedly employed by this Court in discussing issues of attenuation. Taylor v. Alabama, 457 U.S. 691, 102 S.Ct. 2064, 73 L.Ed. 2d 314 (1982); Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985). Thus, it is abundantly clear that the appellate court was employing the correct standard of law in the instant case, and petitioner has failed to raise any issue of law.

Moreover, the appellate court also correctly analyzed the facts in light of the legal standards in the instant case. The court properly concluded that the time between petitioner's arrest at his home and his confession at the police station was too brief to attenuate the taint. See Brown v. Illinois, supra. The Court also properly concluded that application of the other three factors operated to attenuate the taint: petitioner received Miranda warnings; the police misconduct was not flagrant; and the probable cause provided by Alfie Jones' statement constituted an intervening circumstance.

Petitioner does not dispute that he received the Miranda warnings prior to making his statement. Rather, he disputes the appellate court's conclusion that the police misconduct was not flagrant, erroneously likening the instant case to Taylor v. Alabama, 457 U.S. 691, 102 S.Ct. 2064, 73

L.Ed. 2d 314 (1982). He further objects to the court's determination that Alfie Jones' detailed statement implicating petitioner constituted an intervening circumstance, asserting without any support in the record that the statement was obtained in violation of Alfie Jones' constitutional rights and the appellate court incorrectly applied a per se test. A brief examination of defendant's contentions reveals that they are meritless.

The appellate court's determination that the police officers' conduct was not flagrant finds ample support in the record. In light of the circumstances of this case, it is clear that the police acted in a reasonable fashion. Based on a tip that three individuals had knowledge of a serious crime, a senseless murder, they went to the homes of these individuals at a reasonable hour, 2:00 p.m., and asked then to come to the station for questioning. They spoke with petitioner's family and, although what was

said is in conflict, the family was aware they were police officers and that they wanted to talk to the defendant. The request to question petitioner at the police station was reasonable in light of the fact that the police had three individuals they planned to speak to and the fact that the individuals might be less likely to talk freely at home in front of their families. Thus, the police station was the most convenient and available location to conduct interviews. The police conduct at the police station was reasonable. Petitioner was asked to sit in an interview room; he was not booked, fingerprinted, handcuffed, or placed in a cell while the officers questioned Alfie Jones. Immediately after the conclusion of the interview with Jones, and having obtained probable cause, the officers advised petitioner that he was under arrest and read him the Miranda warnings.

As this Court has previously observed, "Unfortunately, the task of defining 'custody' is a slippery one and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.' [citation]" Oregon v. Elstad, 470 U.S. 298, 309, 105 S.Ct. 1285, 1292, 84 L.Ed. 2d 222 (1985). In the instant case, the officers' belief that petitioner was not in custody for the two hour period prior to their notification that he was under arrest was ruled to be erroneous, but their conduct could not fairly be described as "flagrant." A comparison with the police conduct in Taylor v. Alabama, supra, which was flagrant, only serves to underscore this conclusion. In Taylor, police officers went to petitioner's home and without probable cause, or a warrant, informed him that he was under arrest, searched him and took him to the police station, where he was given Miranda warnings, questioned several times,

fingerprinted and subjected to a lineup. 457 U.S. at 691. Clearly, the police conduct in the instant case was less egregious.

The appellate court likewise properly concluded that Alfie Jones' detailed and corroborated eyewitness statement implicating defendant acted as an intervening circumstance, giving the police probable cause to arrest petitioner at the police station. Petitioner's attacks on this determination by the court are also meritless. His bold assertion that Alfie Jones was illegally under arrest at the time he made his statement finds no support whatsoever in the record. Moreover, petitioner has no standing to complain of a violation of Jones' rights. Murphy v. Hunt, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982); Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96, (1979); Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). Finally, United States

v. Cherry, 759 F.2d 1196 (5th Cir. 1985) does not support defendant's argument that the Appellate Court improperly relied on the existence of an intervening circumstance but instead supports the court's ruling in the instant case. The subsequent Cherry decision, United States v. Cherry, 794 F.2d 201 (5th Cir. 1986), which petitioner fails to cite, provides even further support for the appellate court's opinion.

While the Fifth Circuit in the 1985 Cherry opinion did reject a rule that the intervening advent of probable cause would be per se sufficient to purge the taint of an illegal arrest, the court stated, "we think that the intervening acquisition of probable cause is an important attenuating factor in the analysis," and remanded the case to the district court for a determination of whether the defendant's consent to search was untainted by the prior illegal arrest. 759 F.2d 1212. The Fifth

Circuit subsequently upheld the district court's determination that defendant's consent to search was not tainted by his illegal arrest, after a consideration of the four factors set forth in Brown, supra. United States v. Cherry, 794 F.2d 201, 205-207 (5th Cir. 1986). In so ruling, the court observed, "The development of independently procured probable cause following an illegal arrest is a critical factor attenuating the taint of the initial legal arrest." 794 F.2d at 206. Thus, the rationale of Cherry is in full accord with the opinion of the Illinois Appellate Court in the instant case.

In conclusion, the appellate court properly applied the established law set forth by this Court in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975), for determining whether the taint from an illegal arrest has been attenuated. The court then properly analyzed the facts of the instant case in light of the factors set

forth in Brown in concluding that the taint of petitioner's initial illegal arrest was attenuated by: (1) the fact that petitioner received Miranda warnings; (2) the fact that the police misconduct was not flagrant; and (3), by the advent of an intervening circumstance, Jones' detailed and corroborated statement implicating petitioner. Petitioner therefore has raised no issue of law, novel or otherwise, and his petition for a writ of certionari should be denied.

II.

NO LEGAL ISSUE IS RAISED WHERE THE ILLINOIS APPELLATE COURT CONSIDERED EACH PROSECUTORIAL COMMENT NOW RAISED BY PETITIONER AS DENYING HIM DUE PROCESS, APPLIED ESTABLISHED ILLINOIS PRECEDENT AND PROPERLY CONCLUDED THAT THE REMARKS DID NOT SERVE TO DEPRIVE PETITIONER OF A FAIR TRIAL.

Petitioner asserts that several comments made by the prosecutor denied him due process, and that the Appellate Court's determination to the contrary is erroneous. However, he cannot possibly meet his burden of showing that the comments require reversal of his conviction under Darden v. Wainwright, ___ U.S. ___, 106 S.Ct. 2464, 94 L.Ed. 2d (1986). In Darden, this Court established the standard for determining whether prosecutors' comments denied petitioner a fair trial, stating, "it is not enough that the prosecutor's remarks were undesirable or even universally condemned. [citation] The

relevant inquiry is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. [citation]"

A review of the Appellate Court's opinion in the instant case reveals that it considered each comment raised here by petitioner, applied established Illinois precedent and properly concluded that the comments, whether viewed individually or cumulatively, did not serve to deny defendant a fair trial. Regarding the remark that petitioner again claims had the effect of disparaging the presumption of innocence, the Appellate Court observed that the prosecutor corrected himself and properly informed the jury as to the law following a defense objection. People v. Pierson, 166 Ill. App. 3d 558, 519 N.E.2d 1185 (1st Dist. 1988). As to the isolated references to the victim's family, the court concluded that considered

in the context of the entire case, it was at most harmless error. The Appellate Court also noted that the prosecutor's remark that, "I am Michael Samawi for the purposes of this argument..." was clearly invited by defense counsel's argument that, "for the purpose of this trial I am Wayne Pierson...."

The Appellate Court properly resolved all of petitioner's claims concerning closing argument; again he raises no legal issue, novel or otherwise. The petition for a writ of certionari should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 88-218

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OCTOBER TERM, 1988

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Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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I.

Respondent's position that police action was not flagrant is erroneous and contrary to this Court's prior opinions, where the police without a warrant and without probable cause seized a sixteen year old at his home, took him from the company of his parents by deception, and then perjured themselves in court in a continued attempt to violate petitioner's Fourth Amendment rights.

Implicit in the finding of the trial court is that: the police without anything even approaching probable cause[1] seized a sixteen year old at his house, by deception took him out of his "parents"[2] presence, lied to his parents as to why they wanted to speak to him, never told his parents they were taking him to the police station, seized petitioner for the purpose of interrogation, held petitioner against his will until he was questioned, and failed to have a juvenile officer present as required by State statute. The representation of the State of Illinois that such conduct is not flagrant because

1. Petitioner was arrested based upon an uncorroborated anonymous tip.

2. It was from the presence of his grandmother and common law grandfather.

petitioner was not beaten, is contrary to this Court's specific holding in Taylor v. Albama, 457 U.S. 687, 73 L.Ed.2d 314 (1982). The Court in Taylor specifically found that a situation as here is a most flagrant violation. The Court stated:

> "Finally, the State argues that the police conduct here was not flagrant or purposeful, and that we should not follow our decisions in Brown and Dunaway for that reason. However, we fail to see any relevant distinction between the conduct here and that in Dunaway. In this case, as in Dunaway, the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up. The fact that the police did not physically abuse petitioner, or that the confession they obtained may have been 'voluntary' for purposes of the Fifth Amendment, does not cure the illegality of the initial arrest." Taylor v. Alabama, 457 U.S. 687, at 693.

The State's argument in support of the Appellate Court's determination of lack of flagrancy (Respondent's Brief, pp. 14-15) is inaccurate. As found by the trial court, there never was a request to petitioner's parents to question petitioner at the police station. Even the Appellate Court admitted that the trial court found that petitioner was taken out of his house through police deception.[3]

The officers' conduct is most flagrant because it was action done in bad faith. Leon v. United States, 468 U.S.

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3. The Appellate Court stated:

> "Although the trial court found that the police used deception in gaining initial access to the defendant, the deception apparently ended at the defendant's house." (App., p. 23)

897, 82 L.Ed.2d 677 (1984). Any experienced officer would know that even with probable cause (and here there was none) a warrant is necessary for an arrest at a person's home. Payton v. New York, 455 U.S. 573, 63 L.Ed.2d 639 (1980). As good faith avoids application of the exclusionary rule, bad faith must cause strict application.

What makes the officers' action more flagrant than in Taylor, requiring invoking the full force of the exclusionary rule, is that the police in furtherance of their attempt to violate Petitioner's Fourth Amendment rights, committed perjury. The trial court stated:

> "The Court finds that the defendant did not voluntarily go to the police station; the defendant was illegally detained by police; he was not free to

> leave, as was suggested by the State.
>
> The Court rules that the police had no probable cause for the initial arrest of the defendant at his home, and I will state that I do not believe the police officers' testimony in this regard; that he was free to leave.
>
> Relative to the initial arrest, I do believe the testimony which was offered by the Defense witnesses concerning police conduct at the defendant's home, and I disbelieve the officers' testimony." (Tr. 206) (Emphasis added.)

Where the police action is so flagrant, subsequently obtained probable cause should not remove the taint because it does not remove the benefit gained by the police through their unconstitutional seizure. In Murray v. United States, 487 U.S. ___, 101 L.Ed.2d 472 (1988), this Court held that the exclusionary rule, as applied, must not permit the government to be in either a better or worse

position than before the unconstitutional act. The police by isolating him has obtained a definite benefit from the illegal conduct. Petitioner has been removed from his home--a secure setting among his family who might assist him in requesting or obtaining counsel--to the secluded police station. In seclusion a sixteen year old is less likely to request a lawyer or advice of family.

The error of the respondent's position, i.e., that Miranda and independent probable cause removes taint, is that this position provides no incentive for the police to abide by the Constitution and strong incentive to violate the Fourth Amendment. The subsequent independent probable cause and Miranda advice rule suggested by respondent provides the police incentive

to violate the Fourth Amendment. They have incentive to do just what was done here--round up suspects without probable cause, and hope one accuses another so there is now probable cause and then hope that a statement is given. Such police conduct is just what the Fourth Amendment was designed to prevent.

The opinion of the State Appellate Court is in direct contradiction of the decisions of this Court that seizing a person at his house without even a semblance of probable cause, transportation to the police station, holding him against his will at the police station for an investigation and interrogation is a flagrant violation of the citizen's rights. Taylor v. Alabama, supra; Dunaway v. New York, 442 U.S. 200,

60 L.Ed.2d 824 (1979); Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975).

This case presents to the Court crucial issues that should be resolved.

Respectfully submitted,

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